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January 18, 1994

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JAN 18 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222, Stop Code 1170  
Washington, DC 20554

Re: MM Docket No. 93-290

Dear Mr. Caton:

We are submitting herewith on behalf of Time Warner New York City Cable Group the original and four (4) copies of its Reply Comments in the above-referenced rulemaking proceeding.

Should there be any questions concerning the Reply Comments, please communicate with the undersigned.

Very truly yours,

*John R. Wilner*

John R. Wilner

JRW/jsa  
Enclosures

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BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

RECEIVED

JAN 18 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Section 76.51 of the )  
Commission's Rules to Include )  
Newton, New Jersey, and Riverhead, )  
New York, in the New York, )  
New York-Linden-Paterson-Newark, )  
New Jersey Television Market )

MM Docket No. 93-290

To: Chief, Mass Media Bureau

**REPLY COMMENTS OF TIME WARNER  
NEW YORK CITY CABLE GROUP**

Time Warner New York City Cable Group ("TWC"), by its attorneys, hereby replies to comments filed in the above-captioned proceeding by the following parties: (1) Bridgeways Communications Corp., licensee of Station WHAI-TV, Bridgeport, Connecticut ("WHAI-TV"); (2) Mountain Broadcasting Corporation, licensee of Station WMBC-TV, Newton, New Jersey ("WMBC-TV"); (3) WLIG-TV, Inc., licensee of Station WLIG(TV), Riverhead, New York ("WLIG"); and (4) WTZA-TV Associates Limited Partnership, licensee of Station WTZA(TV), Kingston, New York ("WTZA"). In support whereof, the following is shown.

**I. Background**

In response to petitions for rulemaking filed by WMBC-TV and WLIG, the Mass Media Bureau has proposed to rehyphenate

the New York, New York-Linden-Paterson-Newark, New Jersey television market (the "New York Market") to include the communities of Newton, New Jersey and Riverhead, New York. TWC demonstrated in its Comments filed on December 20, 1993, that neither proposal meets the Commission's established criteria for rehyphenation of an existing market designation in Section 76.51 of the Rules. TWC also showed that subscribers to its Brooklyn, Manhattan, Queens and Staten Island cable systems would be disserved if TWC is compelled to drop existing cable programming services in order to make room for the signals of fringe market television stations whose programming has no interest or appeal for subscribers to TWC's cable systems.

In addition to the Newton and Riverside proposals, the Mass Media Bureau on its own motion solicited comments on whether one or more of the following cities of license within the New York ADI should be added to the New York Market: Secaucus, NJ, Bridgeport, CT, Poughkeepsie, NY, Kingston, NY and Smithtown, NY. TWC reserved the right to oppose such additional rehyphenation proposals in its reply comments following review of showings made by any proponents in their initial comments.

Mountain and WLIG submitted comments in support of their respective proposals. In addition, WHAI-TV has supported the inclusion of Bridgeport in the New York Market while WTZA has done the same for Kingston. Significantly, there were no

comments filed in support of the additions of Secaucus, Poughkeepsie and Smithtown to the New York Market. Comments opposing any further rehyphenation of the New York Market were filed by Cablevision Systems Corporation ("Cablevision") and U.S. Cablevision Corporation ("U.S. Cablevision").

**II. No Further Consideration Is Warranted  
For Secaucus, Poughkeepsie and Smithtown**

Ignoring the Mass Media Bureau's explicit invitation, the licensees of the television stations licensed to Secaucus (WWOR-TV), Poughkeepsie (WTBY) and Smithtown (WHSI) failed to express any interest in pursuing the possible designation of their respective cities of license as part of the New York Market. Thus, it appears that those parties that stand to benefit directly from the market rehyphenations initiated by the Mass Media Bureau have determined that their interests would not be served by inclusion in the New York Market. Accordingly, without such expressions of interest, and in the absence of any factual information on which to base a decision as to the merits of each proposal, TWC submits that the Mass Media Bureau must drop Secaucus, Poughkeepsie and Smithtown from any further consideration in this proceeding.<sup>1/</sup>

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<sup>1/</sup> In FM and television channel allotment proceedings the Commission generally requires an expression of interest from the proponent or beneficiary of the proposed allotment. A similar policy is appropriate for market redesignation proceedings.

### **III. Newton, NJ and Riverhead, NY**

The arguments advanced by WMBC-TV and WLIG in support of their rehyphenation proposals are essentially a rehash of their respective petitions for rulemaking and were fully addressed by TWC in its Comments. In summary, neither petitioner has satisfied the Commission's threshold criteria for market hyphenations or, alternatively, the criteria used by the Commission to evaluate proposed ADI market modifications.

### **IV. Bridgeport, CT and Kingston, NY**

As has been well-documented in this proceeding, a proponent of a market redesignation must demonstrate the competitive commonality of its community and the market as a whole.<sup>2/</sup> The factors to be considered by the Commission in assessing market hyphenation proposals are as follows: (1) the distance between the existing designated communities and the community proposed to be added; (2) whether cable carriage of the subject station would extend to areas beyond its Grade B coverage area; (3) the presence of a clear showing of particularized need by the requesting station; and (4) benefit to the public of the proposed change. As TWC demonstrated with respect to Newton and Riverhead, WHAI-TV and WTZA have failed to establish that the additions of Bridgeport and/or Kingston to the New York Market meet the Commission's criteria.

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<sup>2/</sup> Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, 8 FCC Rcd 2965, 2978 (1993) ("Report and Order").

The distances between Bridgeport and Kingston, on the one hand, and the communities now designated as part of the New York Market on the other, are considerable. Bridgeport, located in Connecticut, is approximately 55 miles from New York City and between 65-75 miles from Linden, Paterson and Newark. Kingston is located some 80 miles from New York City and between 80-105 miles from the other cities.<sup>3/</sup> The significance of these distances between cities, as well as the locations of the WHAI-TV and WTZA transmitter sites close by their cities of license, is emphasized by the fact that neither Station covers New York City, or any other designated city in the New York Market, with a Grade B contour.<sup>4/</sup> Thus, it is clear that the Grade B contours of Stations WHAI-TV and WTZA are not co-extensive with those of the New York Market stations, with large areas of the Market unserved by the two Stations and located beyond the Stations' natural off-air markets. Consequently, cable carriage of WHAI-TV and WTZA throughout the New York ADI would extend these Stations well beyond their respective Grade B contours.

The common "particularized need" thread running through the comments of WHAI-TV and WTZA, as well as WMBC-TV and WLIG, is that the Commission is compelled to rehyphenate the New York Market in order that their stations may obtain copyright-free

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<sup>3/</sup> The distance between Bridgeport and Newton is approximately 90 miles. Kingston is about 80 miles from Newton.

<sup>4/</sup> Television & Cable Factbook, Stations Vol. No. 61 (1993), pp A-213; A-790.

cable carriage throughout the New York ADI. It is asserted that only through such rehyphenations will the stations be able to achieve the ADI-wide carriage available under the new must-carry rules and thereby compete effectively with the other stations in the ADI.

In their comments, both TWC and Cablevision established that Congress did not intend the Commission to use its market hyphenation procedures solely to relieve a station from providing copyright liability indemnification as a condition to carriage in areas beyond the station's copyright-free zone. Recognizing this limitation, the Commission expressly disavowed making wholesale changes in the Section 76.51 list of top-100 television markets, holding instead that it would consider changes on a case-by-case basis in accordance with established criteria.<sup>5/</sup> Thus, the pleas (wholly undocumented) of financial hardship from the television station licensees are manifestly insufficient on their own to establish the required "particularized need" for adoption of the proposed market designations.

Neither WHAI-TV nor WTZA makes any claim to serve the programming needs and interests of New York City residents. Indeed, WHAI-TV fails to discuss its current programming lineup at all while WTZA's new "newsheel" format plainly is geared toward viewers within the Station's local service area.

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<sup>5/</sup> Report and Order, 2978.

Furthermore, neither Station has made any showing of cultural, social, economic or demographic commonality between their cities of license and New York City, the indisputable hub of the New York Market. In sum, while the private interests of WHAI-TV and WTZA would be benefitted by addition of their cities to the New York Market, the interests of TWC's subscribers plainly would be disserved by the deletion of any current cable programming service in order to provide a channel for WHAI-TV or WTZA.<sup>9/</sup>

#### V. Conclusion

The Commission's new must-carry rules afford WMBC-TV, WLIG, WHAI-TV and WTZA the right to carriage on TWC's cable systems operating in New York City. Such carriage rights, however, are conditioned upon the Station's agreement to indemnify TWC against all copyright liability related to carriage of a "distant" signal under Section 111 of the Copyright Act of 1976. Attempting to circumvent the Congressionally-approved indemnification requirement, the Stations have sought the shoehorn their particular circumstances into the narrow confines of the Commission's market hyphenation policies and procedures. As TWC, Cablevision and U.S. Cablevision have shown, the Stations have failed to meet the Commission's criteria for rehyphenation of the New York Market to include all or any of Newton, Riverhead, Bridgeport and Kingston. Accordingly, TWC requests

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<sup>9/</sup> TWC described in its Comments the impact on its operations if it is forced to dedicate cable channels to one or more fringe market television stations.



the Mass Media Bureau to retain the New York Market designation as it now appears in Section 76.51 of the Commission's Rules.

Respectfully submitted,

**TIME WARNER NEW YORK  
CITY CABLE GROUP**

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January 18, 1994

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**CERTIFICATE OF SERVICE**

I, Jacqueline S. Ashton, a secretary with the Law firm Bryan Cave, hereby certify that on this 18th day of January, 1994, a copy of the foregoing "Reply Comments Of Time Warner New York City Cable Group" was sent first class mail, postage paid to the following:

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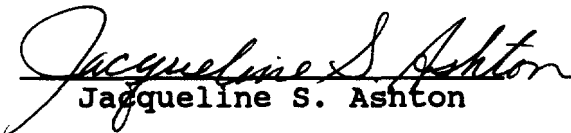
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